No. 13017

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMET THEATRE ENTERPRISES, INC.,

Appellant,

vs.

LEON CARTWRIGHT, WILLIAM E. WILSON, CARTWRIGHT & WILSON CONSTRUCTION CO., a Copartnership, and CARTWRIGHT & WILSON CONSTRUCTION CO., a Corporation,

Appellees.

APPELLEES' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

Cases

Statutes

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APPELLEES' REPLY BRIEF.

Appellant without relying on any of the testimony taken at the trial seeks a reversal of the trial court's judgment on the sole question as to whether or not as a matter of law a party who has voluntarily made payment to another who is unlicensed, for what appellant chooses to designate as "contracting services" performed by the latter. The Findings of Fact state, "Defendants were employed by plaintiff in connection with the construction of a drive-in theatre in Pasadena, California, in connection with said construction defendant supervised certain of the work, consulted with and furnished certain plans and specifications to plaintiff's architect and arranged for two or more experienced subcontractors to come to Pasadena from Utah to do various parts of the work." It is,

therefore, apparent that appellant's designation that these were contracting services is not borne out since no evidence taken in the trial court is in the record.

Appellant argues, regardless of the foregoing, that it is entitled to recover as a matter of law for a payment voluntarily made for services actually rendered, regardless of the nature of the services rendered by the appellees in connection with the construction of the drive-in theatre. It will be noted that Section 7031 of the Business and Professions Code of the State of California, quoted at length on page 5 of appellant's opening brief, provides that no person engaged in business or acting in the capacity of a contractor may bring an action in any court of this State for compensation for the performance of any act or contract for which a license is required, etc., without proving that he was a duly licensed contractor at all times during the performance of such act or contract which is the civil penalty all unlicensed parties have cast upon them by the law of California. This is not a case where an unlicensed contractor is suing to recover compensation as were the facts in the cases cited in the appellant's opening brief except those cases such as *Elmers v. Shapiro,* 91 Cal. App. 2d 741, which deals with a violation of the Veterans Emergency Housing Act of 1946, 50 U. S. C. A. P., Section 1921 *et seq.* Section 7(d) thereof which is quoted at length on page 749 of the opinion and specifically gives the person who buys such housing accommodations a right to sue for the amount of consideration which exceeds the maximum ceiling price, and *Miller v. California Roof Co.,* 55 Cal. App. 2d 136, which deals with the violation of the Corporate Securities Act.

The case which we think is decisive here, namely, *Holm v. Bramwell,* 20 Cal. App. 2d 332, which case at page 337 (cited in appellant's brief) states,

> "There are certain cases in which a recovery may be authorized in spite of an illegal contract, when the action is not founded on the illegal contract, but when on the contrary it is based upon a subsequent legal contract or agreement which may be established without reference to the illegal contract.
>
> "In the present case, the plaintiff clearly is not entitled to recover a lien to secure the repayment of money which he advanced George Collins pursuant to an illegal contract for the reason that this suit is based upon that illegal contract and the claim cannot be established except by reference to the price fixed by the illegal contract. The present case, therefore, does not come within the exception to the general rule, above mentioned.
>
> "The contract between the plaintiff and the subcontractor, Collins, being illegal and void, and the advances alleged to have been paid to Collins are not recoverable in this suit for the reason that they must be deemed to have been voluntarily made. (Meyers v. City of Calipatria, 140 Cal. App. 295, 299; Metropolitan Casualty Insurance Co. v. Stone, 125 Cal. App. 430, 438.)"

In the *Meyers* case, *supra,* it is said in that record:

> "It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. If he voluntarily pays an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pays such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, be-

cause it would be against the highest policy for transactions to be opened upon grounds of this character."

If counsel expects to demonstrate that the parties were not *in pari delicto* with no evidence received at the trial before this court it will indeed take some doing. Without such a showing none of the cases cited have any application to the case at bar.

To demonstrate *ad absurdum* appellant's rationale by citing a ridiculous hypothesis for the sole purpose of emphasis appellant would have this court hold that if one employed another to build a house for him for the sum of $25,000.00, the house was completed and accepted, the money paid and after living in the house for a year, being perfectly satisfied and intending to keep it, the owner could sue the building contractor for the return of the entire cost of construction because the builder had failed to procure a license and recover the amount paid. The penalty provided in Section 7031, *supra,* is that the unlicensed contractor forfeits his right to maintain an action just as one who does business under a fictitious name forfeits his right to maintain an action under that fictitious name until he has complied with the statutes in such cases made and provided.

Examination of all of plaintiff's authorities will demonstrate that they are not factual in point and are readily distinguishable on legal grounds.

There is no valid basis on which the case should be reversed.

Respectfully submitted,

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By HULEN C. CALLAWAY,

Attorneys for Appellees.